

HR Weekly Podcast
04-22-2015

Today is April 22, 2015, and welcome to the HR weekly podcast from the State Human Resources Division. Today's topic concerns the United States Supreme Court's recent ruling regarding the Whistleblower Protection Act, or WPA.

In July 2003, the Department of Homeland Security, or DHS, issued a confidential advisory warning that members of al-Qaida were planning to hijack a long-distance flight. Air marshals across the country were called in for secret briefings about the details of the plot. Forty-eight hours later, however, they were informed that missions on overnight, long-distance flights were being canceled. Robert J. MacLean, a federal air marshal for the Transportation Security Administration, or TSA, initially thought the cancellation message was a joke or a test of some sort. He complained to TSA officials. MacLean then called the inspector general's hotline. Fearing for the public's safety, MacLean blew the whistle and leaked the story to a reporter. Due to the media coverage and congressional concern, TSA was forced to eliminate the cutbacks. MacLean was not named in the reporter's story, but three years later TSA discovered his role and he was fired. He challenged his dismissal as illegal retaliation under the WPA.

The WPA prohibits federal employers from taking personnel actions against a worker for exposing information that he reasonably believed would prevent "a specific danger to public health or safety." That law does have exceptions including not providing this coverage to employees who disclose the information that is "prohibited by law." MacLean argued the exception did not apply because, although his actions had been prohibited, it was prohibited by an agency regulation, not by a law. The Merit Systems Protection Board, citing TSA regulations that make it illegal to disclose "specific details of aviation security measures," ruled against MacLean. The board said the disclosure was "specifically prohibited by law."

When the case made it to the United States Supreme Court, the Court sided with MacLean by a 7-2 vote. The question before the Court was whether an agency *regulation* is the same thing as a law in this context. "The answer," the Court said, "is no." Chief Justice John Roberts wrote the majority opinion and concluded that the violation of the TSA regulation is not enough to deny MacLean protection under the WPA. The Court pointed out that the full phrase "law, rule or regulation" appears elsewhere within the WPA. Therefore, if Congress had intended the particular section in question to exclude disclosure of information "prohibited by law, rule or regulation" from the WPA, it would have written the law to do so. Yet in this section, the WPA was specifically drafted to exclude only disclosures that are "prohibited by law." The Court said that the air marshal's alert about safety concerns was shielded by the federal whistleblower protection law. DHS argued that disclosures of sensitive information and the message sent by a judgment protecting those disclosures as whistleblower activity would present its own threat to public safety and security. The Court found those concerns legitimate, but Justice Roberts noted they could be addressed by Congress through statute or by the president through an Executive Order. If the need to prohibit the disclosure of such information is critical enough to public safety and national security, then it should be excluded from protection under the WPA by law rather than a set of agency regulations. Otherwise the Court held agencies could easily circumvent the WPA by simply adopting internal regulations prohibiting whistleblowing.

While the reach of the WPA is mostly of interest to government employers, all employers should be attentive to the growing body of law protecting whistleblowers from retaliation. Courts consistently rule in favor of whistleblowing and are reluctant to discourage employees to come forward with knowledge of unethical, illegal, or endangering policies and practices. Accordingly, employers should be particularly cautious if disciplinary action is taken against an employee who has participated in whistleblowing activity. Thank you.